



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 161 OF 2016

PETER W. CHIKATI1ST PLAINTIFF

AGNES N. NAKHABALA2ND PLAINTIFF

DWW (MINOR)3RD PLAINTIFF

VERSUS

JOHN OBOTE WAMALWA 1ST DEFENDANT

JOSHUA PWOKA.....2ND DEFENDANT

J U D G M E N T

PETER W. CHIKATI and AGNES N. NAKHABALA (the 1st and 2nd plaintiffs respectively) and suing on behalf of a minor **DWW**) filed this suit on 19th December 2016 seeking Judgment against **JOHN OBOTE WAMALWA** and **JOSHUA PWOKA** (the 1st and 2nd defendants respectively) in the following terms with respect to the land parcel **NO KIMILILI/KIMILILI /3665** (the suit land): -

(a) A permanent injunction restraining the defendants, their representatives, servants, agents, workers and any persons claiming through them from trespassing, developing, constructing, cultivating and/or interfering in any way with the plaintiffs' land L.R KIMILILI/KIMILILI/3665.

(b) An order of eviction against the defendants, their representatives, servants and agents from the land NO LR KIMILILI/KIMILILI/3665.

(c) Costs and interest of the suit at Court rates.

(d) Any other relief that this Honourable Court shall deem fit and just to grant.

The basis of the plaintiffs' claim is that they are parents and next friend of **DWW** for whom they purchased the suit land in 2012 from **ATHUMANI KHISA MANYONGE**. However, the defendants have unlawfully and illegally encroached and trespassed onto the suit land without the plaintiffs' consent and are constructing illegal structures thereon thus necessitating this suit.

Together with the plaint, the plaintiffs filed their statements. They also filed statements of their following witnesses: -

1. GABRIEL KIZITO MHANYA (PW 3).

2. ATHMANI KHISA MANYONGE (PW 4).

The plaintiffs also called as their witness during the plenary hearing **SIMIYU AMOS WEKESA (PW 5)** the **LAND SURVEYOR BUNGOMA COUNTY** who, by virtue of being an expert, did not record any statement as provided by the provisions of **Order 3 Rule 2(c)** of the **Civil Procedure Rules**.

The plaintiffs also filed a list of documents dated 19th December 2016 containing the following: -

1. Title deed for L.R NO KIMILILI/KIMILILI/3665.

2. Certificate of Official Search for L.R NO KIMILILI/KIMILILI/3665.

3. Copy of sale agreement dated 9th March 2013 between the plaintiff and ATHUMANI KHISA MANYONGE (this was actually annexed to the 1st plaintiff's supporting affidavit in the plaintiffs' application for interim injunction).

By another list of documents filed on 2nd October 2019, the plaintiffs listed the following: -

- 1. Copy of Green Card for L.R NO KIMILILI/KIMILILI/2316.**
- 2. Copy of mutation form for L.R NO KIMILILI/KIMILILI/2316.**
- 3. Copy of Official Search for L.R NO KIMILILI/KIMILILI/3665.**
- 4. Copy of Green Card for L.R NO KIMILILI/KIMILILI/3665.**
- 5. Certified proceedings in BUNGOMA RESIDENT MAGISTRATE'S COURT CRIMINAL CASE NO 1246 OF 2003.**

In their separate statements both dated 19th December 2016, the plaintiffs state that they purchased the suit land in 2012 from **ATHUMANI KHISA MANYONGE** which they registered in their names for their minor son **DWW**. However, they were surprised to see the defendants encroaching and trespassing on the suit land and they therefore filed this suit.

In his statement dated 1st October 2019 **GABRIEL KIZITO MHANYA** (PW 3) states that he was a witness to the sale agreement whereby the plaintiffs purchased the suit land from **ATHUMANI KHISA MANYONGE**. That the purchase price was paid in four instalments being: -

Kshs. 250,000/= on 10th September 2012, Kshs. 100,000/- on 9th November 2012,

Kshs. 50,000/= on 14th December 2012 and Kshs. 100,000 on 9th March 2013. That the plaintiffs are therefore the proprietors of the suit land which was a sub – division of land parcel **NO KIMILILI/KIMILILI/2316** and that at no time has it ever been the property of the **COUNTY GOVERNMENT** as confirmed from the Green Card. That the land parcel **NO KIMILILI/KIMILILI/875** and the suit land are two distinct parcels of land. That the defendants have never owned the suit land.

ATHUMANI KHISA MANYONGES (PW 4) confirms in his statement dated 19th December 2016 that he sold the suit land to the plaintiffs who have paid the purchase price in full. He was therefore surprised to hear that the defendants who have no claim to the suit land are interfering with it.

When this case was mentioned before **MUKUNYA J** on 29th March 2017, it was agreed by consent of the parties that the **COUNTY SURVEYOR BUNGOMA** visits the site and file a report showing the position of the suit land on the ground and on what land the defendants have constructed their kiosk. That report was filed by **MR SIMIYU W. AMOS** the **COUNTY SURVEYOR BUNGOMA** on 11th July 2017. The defendants were satisfied with the report but the plaintiffs sought time to have another surveyor prepare a report and were given upto 8th November 2017 to instruct their surveyor to prepare another report. However, they did not submit any other report and therefore on 8th November 2017, the report by the **COUNTY SURVEYOR BUNGOMA** dated 11th July 2017 and filed in Court on the same date was adopted as the order of this Court.

The above report was adopted by **MR SIMIYU W. AMOS** who testified as **PW 5**. I shall revert to the contents thereof later in this Judgment.

The record shows that only the 2nd defendant, acting in person, filed a defence on 30th December 2016. And although Counsel for the defendants has at paragraph (b) of his submissions stated that: -

“The defendants appeared and filed defence – the 1st defendant on 3.1.2016 and the 2nd defendant on 30.12.2016,”

I have perused the pleadings herein and have not seen any defence filed on 3rd January 2016 by the 1st defendant. In any case, this suit was filed on 19th December 2016 and so no defence could possibly have been filed on 3rd January 2016. However, he recorded a statement dated 19th December 2019 and filed herein on 21st January 2020. Without a defence, his testimony can only be considered as supporting the 2nd defendant's case.

The 2nd defendant **JOHN PWOKA** filed a defence on 30th December 2016 in which he denied that the suit land exists and described the plaintiff's suit as baseless, frivolous and a misrepresentation of facts. He added that he owns a plot known as **KIMILILI “D” MARKET 110 and 111** which is within the land parcel **NO KIMILILI/KIMILILI/875**. He denied having erected any structures on the suit land and added that the plaintiff has never demarcated, fenced or been in possession of the suit land and so he cannot allege any trespass and his suit is not sustainable. He also denied having been served with any demand notice and claimed that the title deed held by the plaintiffs is a forgery which should be subjected to investigation and authentication since the suit land does not exist on the ground. That the suit land and another parcel of land **L.R KIMILILI/ KIMILILI/3666** were the subject of a criminal case being **BUNGOMA RESIDENT MAGISTRATE'S COURT CRIMINAL CASE No 1246 of 2003** whereby **ATHUMANI KHISA MANYONGE** was charged for forging various documents at the Land Registry. He urged this Court to verify and ascertain the legitimacy of the title deed for the suit land and strike out this suit with costs.

The 2nd defendant filed his statement on 21st January 2020, the statement of the 1st defendant **JOHN OBOTE WAMALWA (DW2)**, **ESTHER NASIMIYU PWOKA (DW 3)** and **ALEX MASANGA KIMUNGUI (DW 4)** as his witnesses.

In his statement filed on 21st January 2020, the 2nd defendant **JOSHUA PWOKA** who testified as **DW 2** states that his late father **JOHN WANAMBUKO PWOKA** owned two plots known as **KIMILILI 'D' MARKET 110** and **111** on land parcel **NO KIMILILI/KIMILILI/875** which were later passed on to his mother **ESTHER NASIMIYU PWOKA (DW 3)**. That in November 2016, his mother directed him to carry out repairs on the structures on plot **NO KIMILILI 'D' MARKET 111** but on 20th December 2016, he was served with a Court order that he had constructed a kiosk on the suit land. He states that he has never known that the suit land exists since the parcel of land where his plot is situated is known as **KIMILILI/KIMILILI/875** which is the property of the **COUNTY GOVERNMENT OF BUNGOMA** and the space being claimed by the plaintiffs is also known as **KIMILILI 'D' MARKET 114** which is registered under the name of their neighbour **ALEX KIMUNGUI**. That the report of the **COUNTY SURVEYOR** which was prepared following a consent order shows that the suit land does not exist on the ground and the plaintiffs' suit cannot be sustained since it is based on falsehood, malice and invalid documents.

In his statement, the 1st defendant, who gave his names as **JOHN MANAI WAMALWA WANJALA (DW 1)**, states that the name **OBOTE** is infact a nickname. That having read the plaint, he cannot find any wrong – doing on his part and that the kiosk whose photograph the plaintiff annexed to his affidavit is not on the suit land but is on a road reserve on land parcel **KIMILILI/KIMILILI /875** owned by the **COUNTY GOVERNMENT OF BUNGOMA** which has given out leases for business plots. That on 22nd December 2016, he wrote to the plaintiffs' Counsel requesting for the following documents in order to establish the exact position of the suit land: -

1. **Map sheet 3**
2. **Cadastral plan**
3. **Copies of Registers of LR NO KIMILILI/KIMILILI/1917, 2316 and 3665.**

That todate, he has not been supplied with those documents. That this Court made an order that the **COUNTY SURVEYOR** should visit the suit land and determine it's position on the ground. A report was filed on 11th July 2017 and indicated that his kiosk is inside the land parcel **NO KIMILILI/KIMILILI/875** and that the suit land was created on the land parcel **NO KIMILILI/KIMILILI/875**. That report was adopted as an order of this Court on 8th November 2017 and has never been set aside.

In her statement dated 19th December 2019, **ESTHER NASIMIYU PWOKA (DW 3)** states that she is the widow of the late **JOHN PWOKA WANAMBUKO** who owned plots **NO 110** and **111** within **KIMILILI 'D' MARKET**. That it is not true that his son the 2nd defendant has constructed a kiosk on the suit land. That the kiosk was infact constructed on plot **NO 111 KIMILILI 'D' MARKET** and therefore the allegations against the 2nd defendant are false.

ALEX MASANGA KIMUNGUI (DW 4) also recorded a statement dated 19th December 2019 in which he states that he owns plot **NO 114 KIMILILI 'D' MARKET** which borders the plot owned by the late **JOHN PWOKA WANAMBUKO**. That the said plots were allotted by the **COUNTY GOVERNMENT OF BUNGOMA**. That the 2nd defendant who is the son of the late **JOHN PWOKA WANAMBUKO** is therefore occupying his late father's plot and not the suit land.

The defendants did not file any documentary evidence.

The hearing commenced on 8th October 2019 when the parties testified and called their witnesses. They all adopted as their evidence their statements contents of which I have already summarized above. The plaintiffs also produced their lists of documents as their documentary evidence. The defendants, as I have already stated above, did not file any list of documents and therefore had no documentary evidence to produce.

Submissions were thereafter filed both by **MS ODONGO** instructed by the firm of **IBRAHIM ALUBALA ADVOCATES** for the plaintiffs having come on record on 16th November 2020 in place of the firm of **J. B. OTSIULA & ASSOCIATES ADVOCATES** and by **MR J. KHAKULA** instructed by the firm of **J. S. KHAKULA & COMPANY ADVOCATES** for the defendants. I must at this stage point out that although the firm of **J. S. KHAKULA & COMPANY ADVOCATES** entered appearance on behalf of the defendants on 18th April 2018, they did not file any pleadings on their behalf. The 1st defendants, as I have already stated above, did not file any defence while the 2nd defendant filed his defence in person on 30th December 2016.

I have considered the evidence by the parties, the documents filed by the plaintiffs and the submissions by Counsel.

The plaintiffs' case is that they are the registered proprietors of the suit land and seek to evict the defendants therefrom and also permanently restrain them, their representatives, servants, agents, workers and any other persons claiming through them from trespassing, developing or cultivating the same. They have produced a copy of the title deed to the suit land issued on 19th March 2013.

Only the 2nd defendant filed a defence and his case is that the suit land only exists on paper. He denied having trespassed onto the suit land adding that the structures which he is alleged to have constructed on the suit land are infact constructed on plots known as **KIMILILI 'D' MARKET 110** and **111** which are on the land parcel **NO KIMILILI/KIMILILI/875** which is owned by the **COUNTY COUNCIL OF BUNGOMA**. He states further that the title held by the plaintiffs is forgery and was the subject of a criminal case being **BUNGOMA RESIDENT MAGISTRATE'S COURT CRIMINAL CASE No 1246 of 2003** where **ATHUMAN KHISA MANYONGE (PW 4)** who sold the suit land to the plaintiffs was charged with the offence of forging various documents at the Land Registry.

In my view, the determination of this dispute hinges on the report by the **BUNGOMA COUNTY SURVEYOR MR SIMIYU W. AMOS** dated 11th July 2017. On 29th March 2017 and with the consent of the parties, the Court directed the **BUNGOMA COUNTY SURVEYOR** to visit the suit land and file a report. His brief was as follows: -

- “1. That the County Surveyor do visit land parcel NO KIMILILI/KIMILILI/3655 and determine it’s position on the ground.**
- 2. The surveyor shall also determine on what land the kiosk erected by the Respondents is situate.**
- 3. The costs of the survey fees shall be shared equally by the Applicants and Respondents.**
- 4. Surveyor’s report to be filed in Court on or before 6th June 2017. Mention on 7th June 2017 for further orders.”**

The **BUNGOMA COUNTY SURVEYOR** subsequently filed a report dated 11th July 2017. Since the report is pivotal in the determination of this dispute, I shall reproduce it in extenso: -

“RE- SURVEYOR’S REPORT ON ENVIRONMENT AND LAND CASE NO 161 OF 2016 PARCEL NO KIMILILI/KIMILILI/3665

I visited the above mentioned parcel of land with all the relevant documents and with all the participants present.

The following observations were made: -

- 1: Land parcel KIMILILI/KIMILILI/3665 was as a result of sub – division from the parcel KIMILILI/KIMILILI/2316 owned by then ACHI WEPUKHULU MAYIKUMA.***
- 2: According to the mutation serial No 114364, the survey was concluded by G. R. R. AGANYO & ASSOCIATES Licensed Surveyor in the presence of the owner occupier.***
- 3: The boundaries of the original parcel KIMILILI/KIMILILI/2316 were not accurately pointed out to the surveyor by the owner occupier during sub division, either with intent to defraud or an omission.***
- 4: As a result of bullet in No 3 above, the parcel KIMILILI/KIMILILI/3665 was surveyed and created on top of parcel NO KIMILILI/KIMILILI/875 owned by the COUNTY COUNCIL OF BUNGOMA reserved for KIMILILI TRADING CENTRE.***
- 5: The kiosk erected by the defendants is inside parcel KIMILILI/KIMILILI/875 registered in the COUNTY COUNCIL OF BUNGOMA reserved for KIMILILI TRADING CENTRE.***

I therefore state that the parcel KIMILILI/KIMILILI/3665 was created outside the boundaries of the original KIMILILI/KIMILILI/2316 fraudulently and should be further investigated.

SIMIYU W. AMOS

COUNTY SURVEYOR.”

The above report was filed on 11th July 2017 but it was not until 3rd October 2017 that it was read to the parties whereupon the defendants told the Court that they agreed with the contents thereof. However, **MR OTSIULA** Counsel for the plaintiffs requested that before the report is adopted as an order of the Court, the plaintiffs be given two weeks to get another surveyor prepare a second report. The request was granted and the matter was listed for mention on 8th November 2017 to confirm if the surveyor appointed by the plaintiffs had filed his report. When the matter was mentioned on 8th November 2017, it transpired that the surveyor appointed by the plaintiffs had not yet visited the suit land nor prepared a report. The plaintiffs sought a further extension which was denied and the report dated 11th July 2017 was adopted as an order of the Court.

It is not in dispute that the plaintiffs hold the title to the suit land. That title was issued on 19th March 2013 and by virtue of the provisions of **Section 26(1)** of the **Land Registration Act**, the plaintiffs are, “*prima facie,*” the “*absolute and indefeasible owner(s)*” of the suit land. That title can however be impeached if it was obtained through fraud, misrepresentation illegally, unprocedurally or through a corrupt scheme. It is the defendants’ case that in fact that title is a paper title and that the suit land was created on top of the land parcel **NO KIMILILI/KIMILILI/875** owned by the **COUNTY COUNCIL OF BUNGOMA** and on which the defendants have erected their kiosks. That assertion has been supported by the surveyor who has gone further to add that the suit land was in fact fraudulently created outside the boundaries of the land parcel **NO KIMILILI/KIMILILI/2316** from which it was curved.

The surveyor who testified as **PW 5** falls in the class of expert witnesses whose evidence is admissible by dint of the provisions of **Section 48(1)** of the **Evidence Act** which provides that: -

“When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impression, opinions upon that point are admissible if made by persons specially skilled in such

foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.”

As indicated above, the Court with the consent of the parties directed the **BUNGOMA COFUNTY SURVEYOR** on 29th March 2017 to visit the suit land and prepare a report indicating, inter alia, **“on what land the kiosk erected by the Respondents is situate.”** That consent order was made with the realization that the said surveyor, being an expert in his field and possessed of the requisite knowledge, was capable of guiding the Court in determining this dispute. And although the plaintiffs later sought time to have their own surveyor prepare a second report, no such report was availed. I did not hear the plaintiffs try to impeach the credentials of the said surveyor who in fact testified as plaintiffs’ witness (PW 5). I have no doubt that the surveyor **SIMIYU AMOS WEKESA (PW 5)** testified as an expert witness in support of his report dated 11th July 2017. He gave independent evidence having been asked by the Court to prepare a report and with the consent of the parties. He gave objective, un – biased and cogent testimony in an area within his expertise and which of course is outside the Court’s knowledge and whereas the Court is not bound by the opinion of the expert, it can take it into account in determining the issues in dispute. And whereas the Court must also be alert to the possibility of such witnesses being compromised, their evidence cannot be trashed off – hand unless there are good reasons to do so. In circumstances such as the one obtaining in this case where it is the only expert evidence available and which was obtained with the concurrence of the parties, such evidence must be given its due probative value. As was stated in **JULIET KARISA .V. JOSEPH BARAWA & ANOTHER CIVIL APPEAL No 108 of 1988**, expert evidence is entitled to the highest possible regard and though the Court is not bound to accept or follow it, such evidence must not be rejected except on firm grounds. The Court must however also consider the other evidence on record. It was the surveyor’s evidence, as per his finding **No 3** in the report dated 11th July 2017, that the boundaries of the original parcel **NO KIMILILI/KIMILILI/2316** from which the suit land was hived off, **“were not accurately pointed out to the surveyor or by the owner during the sub – division either with intent to defraud or on omission.”** As a result of that **“intent to defraud or an omission,”** the suit land was **“surveyed and created on top of parcel NO KIMILILI/KIMILILI/875 owned by the COUNTY COUNCIL OF BUNGOMA and reserved for KIMILILI TRADING CENTRE.”** Indeed, the surveyor goes on to add in the last paragraph of his report that the plaintiffs title to the suit land was created **“fraudulently and should be further investigated.”** There is also evidence produced by the plaintiffs themselves in the form of a charge sheet in **BUNGOMA MAGISTRATE’S COURT CRIMINAL CASE No 1246 of 2003 R. V. ACHI WEPUKHULU MAYIKUMA & ANOTHER**. It shows that the said **ACHI WEPUKHULU MAYIKUMA** the proprietor of the land parcel **NO KIMILILI/KIMILILI/2316** was charged with, inter alia, forging mutation forms **NO 114361** purporting that the same were prepared by the firm of **AGANO AND ASSOCIATES SURVEYORS**. That mutation form resulted in the sub – division of the land parcel **NO KIMILILI/KIMILILI/2316** to give rise to the suit land among other parcels of land. That case was however not heard and **ACHI WEPUKHULU MAYIKUMA** was acquitted on 20th March 2007 after the prosecution could not trace the Police file and their application for an adjournment was declined by **K. NGOMO – SENIOR PRINCIPAL MAGISTRATE**. Nothing much therefore hinges on those proceedings and the less said about them, the better.

That notwithstanding, and having pleaded that the defendants had trespassed onto his land and constructed illegal structures thereon, the burden of proof, as required by **Sections 107 and 109 of the Evidence Act**, lay with the plaintiffs to prove those averments to the required standard. They have failed to do so. During the plenary hearing, the 1st plaintiff denied that the surveyor visited the suit land or that his report was adopted as an order of the Court. Yet the first paragraph of the said report confirms that all the parties were **“present”** during the site visit. And with regard to the adoption of the Surveyor’s report, the record of 8th November 2017 confirm that the said report was adopted by the Court in the presence of **MR KUNDU** holding brief for **MR OTSIULA** for the plaintiffs while the defendants were present in person. The plaintiff’s witness **GABRIEL KIZITO MHANYA (PW 3)** who described himself during cross – examination as a private surveyor merely attempted to trash the report as **“fictitious”** but gave no reasons for that assertion and neither did he produce any further report contradicting the findings contained in the report by the **BUNGOMA COUNTY SURVEYOR MR SIMIYU W. AMOS (PW 5)**. In the face of that clear evidence that the report by the **BUNGOMA COUNTY SURVEYOR MR SIMIYU W. AMOS** was adopted as an order of the Court following a consent order and in the presence of all the parties herein, the 1st plaintiff’s assertion during cross – examination when he said that: -

“I do not recall the surveyor visiting the land”

and also that: -

“I am not aware that the surveyor’s report was adopted as an order of the Court on 8th November 2017. I am not aware that the report says my land is superimposed on land parcel NO KIMILILI/KIMILILI/875.”

only serves to depict him as an unreliable and dishonest person whose testimony should be taken with a pinch of salt.

As stated above, it is not in dispute that the plaintiffs hold the title to the suit land. However, the report by the **BUNGOMA COUNTY SURVEYOR (PW 5)** is a serious indictment on the process used in obtaining it. In the case of **MUNGU MAINA .V. HIRAM GATHINA MAINA 2013 eKLR**, the Court of

Appeal laid down the following principle: -

“We state that when the registered proprietor’s root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

Of course the plaintiffs produced the sale agreement between them and **ATHUMAN KHISA MANYONGE (PW 4)** and other documents in support of their case. However, the un – controverted report and also oral testimony of **MR SIMIYU W. AMOS (PW 5)**, an expert in his own right, is a serious indictment on the plaintiffs’ title to the suit land. When he was cross – examined by the Court, this witness stated thus: -

“Even if someone has the title to parcel NO KIMILILI/ KIMILILI/3665, it does not exist on the ground. That is what I meant that it is a fraud.”

It is also instructive to note that the defendants were the first to put up structures on the suit land. When he was cross – examined by **MR KHAKULA**, the 1st plaintiff said: -

“The land in dispute is 0.03 Ha. It is parcel NO KIMILILI/KIMILILI/3665. Both the defendants have put up structures on the land. The defendants put up theirs first. They have encroached onto my land. I have the title deed.”

That means that by the time the plaintiffs were obtaining the title to the suit land, the defendants were already utilizing it. Indeed, the 2nd defendant told the Court that as far back as 1975, his father had utilized the plot **No 110** before he put up his kiosk. Clearly then, the title **NO KIMILILI/KIMILILI/3665** which the plaintiffs hold could only have been created unlawfully on top of the land parcel **NO KIMILILI/KIMILILI/875** owned by the then **COUNTY COUNCIL OF BUNGOMA** and reserved for the **KIMILILI TRADING CENTRE** as concluded by the **BUNGOMA COUNTY SURVEYOR (PW 5)**. The plaintiffs cannot therefore be entitled to the orders sought in the plaint.

The up – shot of the above is that the plaintiffs’ suit lacks merit. It is hereby dismissed with costs to the 2nd defendant only as the 1st defendant filed no defence.

Boaz N. Olao.

J U D G E

3rd June 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 3rd day of June 2021 by way of electronic mail in accordance with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

3rd June 2021.